MAR 21 1974
MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

October Term 1974

No. 73-1414

STATE OF MINNESOTA,

Petitioner,

vs.

ROBERT ANDREWS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE
STATE OF MINNESOTA

STATE OF MINNESOTA,

Appellant,

vs.

ROBERT ANDREWS,

Respondent.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the State of Minnesota, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Minnesota, reversing the judgment of conviction entered herein on December 21, 1973.

This appeal is taken pursuant to 28 U.S.C. § 1257 (3).

JEROME J. SEGAL
Counsel for Appellant

IN THE

Supreme Court of the United States

October Term 1974

No. _____

STATE OF MINNESOTA,

Petitioner,

vs.

ROBERT ANDREWS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

The Petitioner, the State of Minnesota, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Minnesota entered in this proceeding on September 14, 1973.

OPINION BELOW

The opinion of the Supreme Court of Minnesota not yet reported appears in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Minnesota was entered on September 14, 1973, a timely petition for rehearing en banc was denied on December 21, 1973, and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Whether admission into evidence of the reason why no chemical test for blood alcohol content had been made in a prosecution on a charge of driving under the influence of an alcoholic beverage violates a defendant's privilege against self-incrimination as set forth in the Fifth Amendment of the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

Minn. Stat. 169.121(2) 169.123
Minn. Stat. 611

STATEMENT OF THE CASE

The defendant was arrested on January 1, 1972, as he was operating his motor vehicle on the streets of the City of Saint Paul, and was charged with the offense of driving while under the influence of an alcoholic beverage pursuant to Minn. Stat. 169.121 (1971). He was subsequently transported to Saint Paul Police Headquarters where he was offered either a blood or breath test to determine the amount of alcohol in his blood. The defendant refused to submit to any chemical tests.

The defendant was tried before a jury and, during the course of the trial, the prosecutor elicited testimony from the officers that the defendant was offered certain chemical tests, and that no tests were taken. Defense counsel objected to the admission of this evidence on the grounds that this violated the defendant's privilege against self-incrimination. The trial court overruled the defendant's objection relying on the case of *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826 (1966), and allowed the state to proceed with the evidence.

The defendant was found guilty by the jury on May 9, 1972, and appealed his conviction to the Minnesota Supreme Court.

(a) How the Federal Question is Presented. During the course of the trial, the State called Herbert Hoelzel, a Saint Paul police officer and certified breathalyzer operator, to the stand. Shortly after Officer Hoelzel began testifying, defense counsel objected to the officer being allowed to make any reference to the fact that the Appellant did not take either a blood or breath test. (T. 40). The following conversation took place before the bench outside the hearing of the jury:

Mr. Connolly: "I would object to there being any reference to the test or the defendant's failure to take the test under *State v. McCarthy*, 258 Minn. 287, 104 N.W.2d 673 (1960),

as the case construes 611.11, and I would object to any reference to the failure of the defendant to take the test; and also, in the alternative, I would like to request the Court that, in the event the Court is going to allow the testimony about it, that there be no testimonial reference to where the defendant says "I refuse to take the test".

The Court: "I've already cautioned the State not to specifically get into question and answer on any discussions between the defendant and law enforcement officers. On the question of blood test or breathalyzer test, however, I am going to allow evidence that a blood and breath test were offered and that no test was taken. I do that in view of *Schmerber v. the United States,* which I believe has dealt with the question of nontestimonial evidence such as a blood test or breathalyzer test and since we are not directly getting into any conversations and since the evidence is not offered to prove any refusal, but to show nonavailability of any test results. I believe that's admissible under *Schmerber* against the United States." (T. 40).

Mr. Connolly: "It is our position that this will have the effect of allowing the State to do indirectly what they can't do directly and will influence the jury and prejudice the defendant." (T. 41).

The Court: "Well, in the specific statute which we are proceeding under today it was amended by the last legislature to delete that provision which made a refusal inadmissible. It specifically deleted that last sentence of the statute with regard to admissibility of a refusal. I am not going so far as to allow a statement of refusal. I am simply allowing the State to show at this point why it does not have any test results, ok?" (T. 41).

Upon conclusion of the trial court's remarks, the prosecutor then proceeded with the examination of Officer Hoelzel. Offi-

cer Hoelzel testified that while at St. Paul Police Headquarters he advised the defendant of his constitutional rights to which the defendant replied that he understood these rights. Officer Hoelzel then testified that he asked the defendant a series of questions including whether or not the defendant would consent to either a breath or blood test to determine the amount of alcohol in the defendant's blood. The prosecutor then asked if any tests were taken, to which Officer Hoelzel replied "no". (T. 43).

The State then called Officer Slavik of the Saint Paul Police Department who testified that he was present when either a blood or breath test was offered to the defendant by Officer Hoelzel. The prosecutor then asked the officer if the defendant took any of the tests offered him, to which the officer answered "no". (T. 75).

During the course of his final argument to the jury, the prosecutor stated that all the evidence which the state had to offer was presented. He went on to say "We showed you why there was no evidence of any blood alcohol here today." (T. 121).

The defendant appealed his conviction to the Minnesota Supreme Court, where he assigned as error the actions of the prosecutor in showing that certain chemical tests were offered and no such tests were conducted.

The appeal was considered by the Supreme Court of Minnesota en banc and without oral argument. In reversing the defendant's conviction and granting a new trial, the court relied on the United States Constitution, Amendment V, and Minnesota Constitution Act 1 § 7 and held that:

> "Admission of evidence of a defendant's refusal to submit to chemical testing in prosecution on a charge of driving under the influence of an alcoholic beverage pursuant to

Minn. Stat. 169.121, violates a defendant's right not to be compelled in any criminal case to be a witness against himself."

REASON FOR GRANTING THE WRIT

The Minnesota Supreme Court has decided a federal question of substance in a way not in accord with applicable decisions of this court. No testimonial evidence was elicited from the defendant, and there was no violation of his constitutional rights. The Minnesota Supreme Court failed to distinguish between testimonial and non-testimonial evidence.

The defendant, in his appeal to the Minnesota Supreme Court, placed a great deal of emphasis on the case of *State v. McCarthy*, a case decided in 1960 by the Minnesota Supreme Court in which it was held that unless the defendant voluntarily submitted to chemical testing, the results of any test were inadmissible in a trial for driving while under the influence of an alcoholic beverage. The Minnesota Court, after holding that results from involuntary tests were inadmissible, went one step further and stated that evidence of a defendant's refusal to submit to chemical testing would be equally inadmissible.

However, this Court, in the case of *Schmerber v. California*, decided some six years after *McCarthy*, held that blood samples taken from a defendant without his permission may be introduced into evidence to show the percentage of blood alcohol. The *Schmerber* case clearly overrules the *McCarthy* case, and specifically holds that the privilege against self-incrimination only applies to evidence of a testimonial or communicative nature.

It is clear under *Schmerber* that non-testimonial evidence may be forced from a defendant against his will and then used

against him to convict him of the offense. There is no constituional protection against compulsion to submit to fingerprinting, speaking for identification purposes only, or performing certain physical tests, such as walking.

Non-testimonial evidence is any evidence taken from the person of the suspect which does not involve his comment on his own guilt. Blood samples under *Schmerber* have been held to constitute non-testimonial evidence. Breath tests are also non-testimonial.

Testimonial evidence can be classified as evidence which is verbal evidence obtained from a person asked or told to comment on his own guilt. Because a defendant used words to refuse to take a breathalyzer test, the Minnesota Supreme Court has interpreted this to be a comment by the defendant on his own guilt. However, in the case of *Newhouse v. Misterly*, 415 F. 2d 514, 518 (1969), refusal to submit to a blood test was held not to be a testimonial statement within the Fifth Amendment, but rather as conduct indicating consciousness of guilt.

Other states have dealt with this problem since the *Schmerber* decision, the most notable of which is California, which held in the case of *People v. Sudduth*, 65 Cal. 2d 543, 55 Cal. Rptr. 393, 421 P. 2d 401 (1966), that prosecution's evidence and comment upon refusal of defendant to submit to a breathalyzer test was constitutionally admissible. As stated by Mr. Chief Justice Roger Traynor of the California Supreme Court, in the case of *People v. Ellis*, 65 Cal. 2d 529, 55 Cal. Rptr. 385, 421 P. 2d 393 (1966):

> "Although conduct indicating consciousness of guilt is often described as an 'admission by conduct', such nomenclature should not obscure the fact that guilty conduct is not a testimonial statement of guilt. It is therefore not

> protected by the Fifth Amendment. By acting like a guilty person, a man does not testify to his guilt, but merely exposes himself to the drawing of inferences from circumstantial evidence of his state of mind."

In this case the state attempted to show that certain chemical tests were offered to the defendant and that no tests were conducted. There was no testimony as to any statements made by the defendant which would constitute a refusal to take the test, and, therefore, no violation of the defendant's constitutional rights.

Prior to 1971, Minn. Stat. 169.121(2) contained a specific provision which prohibited the introduction into evidence of a defendant's refusal to submit to chemical analysis. The pertinent part of this statute stated:

> ". . . but the refusal to permit the taking of specimens for such chemical analysis shall not be admissible in evidence."

However, in 1971, this statement was completely deleted from Minn. Stat. 169.121 (2) by the Minnesota Legislature. L. 1971, Ch. 893 § 2.

This deletion, which took place after the *Schmerber* decision, shows a clear legislative intent that such evidence, i.d. a refusal to take a chemical test, may be allowed into evidence.

The Minnesota Supreme Court, in holding that the State is prohibited from showing that the defendant refused certain chemical tests on Fifth Amendment grounds creates numerous problems.

There are hundreds of driving while under the influence cases in Minnesota each year in which no chemical test is made. The existence of chemical tests in cases dealing with DWI is a fact well known by juries. When test results are not

available there are numerous inferences which may be validly drawn, the first being that the defendant took the test and "passed" and the state does not want to introduce this into evidence. A second inference could be that the police never offered the defendant a test. Of course the jury may also infer that the defendant refused to take the test.

It is the State's position that it should not be left up to the jury to speculate why no test results are available to them. Such speculation by a jury in a criminal case can only result in a denial of a fair and impartial trial for the defendant as well as the State.

The Minnesota court totally ignored the legislative intent of Minnesota Session Laws Chapter 893, Section 2, 1971, which deleted a previous section of this statute which prohibited the admission into evidence the fact that the defendant refused to submit to chemical testing. In so doing, the Minnesota court held that the refusal to submit to testing constituted incriminating testimonial evidence, as opposed to the seizure of non-protected real evidence as set forth in *Schmerber*. The Andrews decision has left the question as to whether chemical tests were or were not taken open to speculation and possible misinterpretation by the jury to the detriment of the defendant and the State.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Minnesota Supreme Court.

Respectfuly submitted,

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R. SCOTT DAVIES
City Attorney
A. KEITH HANZEL
Assistant City Attorney
MICHAEL T. DeCOURCY
Assistant City Attorney

APPENDIX

No. 152 St. Paul Municipal Court

State of Minnesota,

Respondent,

43787 vs.

Robert A. Andrews,

Appellant.

Kelly, J.
Concurring specially,
Knutson, C. J.
Dissenting, Peterson, J.,
Otis, J.
Took no part, Yetka, J.,
Scott, J.

Endorsed
Filed September 14, 1973
John McCarthy, Clerk
Minnesota Supreme Court

SYLLABUS

Admission of evidence of defendant's refusal to submit to chemical testing in a prosecution on a charge of driving under the influence of an alcoholic beverage, Minn. St. 169.121, violates a defendant's right not to be compelled in any criminal case to be a witness against himself. U. S. Const. Amend. V; Minn. Const. art. 1, § 7.

Reversed and new trial granted.

Considered en banc without oral argument.

OPINION

KELLY, Justice.

Defendant, convicted by a St. Paul municipal court jury of driving while under the influence of an alcoholic beverage, Minn. St. 169.121, appeals from judgment of conviction and from the order denying his motion for a new trial. We reverse

and grant defendant a new trial on the ground that the trial court committed prejudicial error in admitting evidence that defendant had refused to submit to chemical testing.

In State v. McCarthy, 259 Minn. 24, 104 N. W. 2d 673, 87 A. L. R. 2d 360 (1960), which was also a prosecution under § 169.121, we held that the admission of evidence that permitted the jury to infer that defendant had refused to submit to chemical testing constituted prejudicial error. We based that decision in part upon the privilege against compelled self-incrimination and in part upon § 169.121, which makes chemical testing voluntary on the defendant's part.

Schmerber v. California, 384 U. S. 757, 86 S. Ct. 1826, 16 L. ed. 2d 908 (1966), relied upon by the state, has not caused us to change our opinion that admission of such evidence violates a defendant's right not to be compelled in any criminal case to be a witness against himself. U. S. Const. Amend. V; Minn. Const. art. 1, § 7. Schmerber held that the admission of the results of tests conducted on blood samples taken from an accused without his permission did not violate the accused's right not to be compelled in any criminal case to be a witness against himself. But it does not follow, as the state contends, that since an arrested motorist has no constitutional (as opposed to statutory) right to refuse to submit to chemical testing, he has no constitutional right to have evidence of that refusal excluded from evidence. Indeed, in Schmerber the court emphasized in a footnote that it was not deciding whether admission of evidence of an accused's refusal to submit to chemical testing would violate any of the accused's constitutional rights. 384 U. S. 765, note 9, 86 S. Ct. 1833, 16 L. ed. 2d 916. The argument for holding that admission of evidence of refusal in this context does violate a defendant's constitutional rights is well stated in Note, 78 Yale L. J. 1074, 1084:

> "* * * Evidence of a suspect's refusal * * * is relevant to the crime charged only in its testimonial aspect, as the approximate equivalent of the statement, 'Because I fear that the examination will produce evidence of my guilt, I refuse to permit it.' Therefore, the privilege against self-incrimination seems relevant. There remains the question of whether such testimonial evidence is 'compelled' for purposes of applying the fifth amendment standard. In one sense the testimonial action is obviously not compelled—the state is not ordering the suspect to *refuse* cooperation. But the state does compel a suspect to choose between submitting to a perhaps unpleasant examination and producing testimonial evidence against himself. The suspect's option to submit to a lawfully imposed burden instead of implicitly testifying against himself does not necessarily save the procedure: lifting a lawful burden—the examination—is in effect an inducement that casts doubt on the 'voluntariness' of the testimonial evidence thereby obtained."

In short, we are not convinced that we erred when we held in McCarthy that admission of such evidence in a prosecution under § 169.121 violated an accused's right not to be compelled in a criminal case to be a witness against himself.[1]

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[1] It is difficult to discern any real difference between permitting an arresting police officer in an aggravated robbery case to testify that he advised an accused of his right to remain silent and that anything he said might be used against him and allowing an arresting officer in a "driving under the influence" case to testify that he offered a chemical test. One inference that might be drawn from that testimony in the first case is that the accused, if innocent, would have denied his guilt and made explanation. There being no testimony that he did so would give rise to an inference of guilt. Similarly, in the instant case, testimony that the defendant was offered chemical testing to determine the alcoholic content of his blood and that he refused it gives rise to an inference that he thought the test would prove his guilt. Thus, when a defendant

This court has not specifically adopted any rule regarding the admissibility of this evidence under its inherent rule-making power and, as we have done in many instances, might be inclined to follow the expressed intent of the legislature as a matter of comity. Thus, a discussion of the intent of the legislature would seem to be in order.

We are not convinced, as the state is, that since our decision in McCarthy the legislature has clearly expressed its intent that such evidence be admissible. At the time of our decision, § 169.121 contained no provision specifying whether such evidence was admissible. Then in 1961, following the McCarthy decision, the legislature amended § 169.121, subd. 2, adding the following provision—"but the refusal to permit the taking of specimens for such chemical analysis shall not be admissible in evidence." L. 1961, c. 454, § 9. by L. 1971, c. 893, § 2, the legislature deleted this provision from § 169.121, subd. 2. The legislature's intent in deleting this provision is difficult to ascertain. On the one hand, arguably the legislature intended to remove any statutory barrier to the admission of such evidence. On the other hand, the statute as it now reads is no different with respect to admission of such evidence than it was when interpreted in McCarthy, and a defendant still has the right to refuse to take any tests.

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says "No, I will not take any test," he is testifying against himself. Surely this is testimonial evidence. In State v. Beck, 289 Minn. 287, 183 N.W. 2d 781 (1971), we held it was error to receive into evidence, over objection thereto, testimony of an arresting officer that he gave Beck a "Miranda warning." One of the basic reasons for the Beck decision was that it is impermissible to penalize an individual for exercising his Fifth amendment rights when he is under police custodial interrogation, so the fact that he stood mute or claimed his privilege may not be used against him at trial. Similarly, in a "driving under the influence case" we should not permit testimony that the accused was offered a chemical test and stood mute or claimed his privilege to refuse the test. Compare State v. Roberts, —— Minn. ——, 208 N.W. 2d 744 (1973).

In short, we are unconvinced by the state's arguments that the statute permits admission of such evidence in prosecutions for driving under the influence and that the admission of such evidence does not violate a defendant's constitutional rights.

The only question that remains with respect to this issue is whether the error was prejudicial. In McCarthy, we held that there was little doubt that admission of the evidence of refusal in all probability strongly influenced the jury in reaching its decision notwithstanding the court's instructions to disregard that evidence. The evidence against defendant in this case was no stronger than the evidence against McCarthy; accordingly, we hold that the error was prejudicial.

Additionally, defendant contends that the trial court erred in denying his motion for a mistrial made after one of the arresting officers testified, in response to a prosecution question, that defendant, while in custody and after receiving a Miranda warning, had stated that "he had been read his rights many times before." This evidence arguably apprised the jury of defendant's prior arrest record and therefore, at least under the circumstances of this case, should not have been admitted. However, in view of our decision with respect to the admission of evidence of refusal, we need not decide whether admission of this evidence would alone necessitate a new trial. On retrial, the prosecution should exercise caution so that this error is not repeated.

Reversed and new trial granted.

KNUTSON, Chief Justice (concurring specially).

I concur specially in the majority opinion.

I think it was a mistake to base decision in State v. McCarthy, 259 Minn. 24, 104 N. W. 2d 673, in part on constitutional grounds. Similarly, I think it is a mistake to base this decision on constitutional grounds.

When the legislature amended Minn. St. 169.121 in 1961 it made evidence involved in this case inadmissible as a matter of statutory law. If the rule is based on constitutional grounds, the legislature could not change the rule. When the statute was again amended by L. 1971, c. 893, § 2, it was simply returned to the form it had when McCarthy was decided. Absent a constitutional proscription, there is no reason why the legislature, if it saw fit, could not make this evidence admissible. That is the way I would leave it.

The courts are in complete disharmony on this subject. See, Annotation, 87 A. L. R. 2d 370.

PETERSON, Justice (dissenting).

The majority holds that in a prosecution for driving a vehicle while under the influence of an alcoholic beverage, Minn. St. 169.121, it is, on both statutory and constitutional grounds, prejudicial error to permit the prosecution to establish that defendant had refused to submit to a "chemical test of his blood, breath, or urine for the purpose of determining the alcoholic content of his blood" as provided by § 169.123, subd. 2. I do not agree.[1]

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[1] I do not quibble with the presentation of the issue, although what the trial court ruled was that the state could introduce evidence that the police had offered defendant tests and that none were taken. Because of my view on that more basic issue, I do not consider any secondary issue as to whether the held error was prejudicial, other than this marginal note as to the uncontroverted evidence of guilt. Three police officers testified for the prosecution; no one testified for the defense. The testimony of the police officers was that at the time of his arrest defendant had smelled of alcohol, appeared to be somewhat glassy-eyed, had difficulty standing, had swayed as he walked, and had driven his automobile in an extremely erratic manner. The testimony of the police officers concerning defendant's postarrest conduct was that he "babbled" and that, after receiving a Miranda warning, he admitted that he had been drinking; that he smelled of alcohol and swayed as he walked; and that he had urinated in his pants. These officers understandably were of the opinion that defendant was under the influence of alcohol.

My first point of disagreement is with the interpretation of the present § 169.121 as expressing a legislative intent to make such evidence of refusal inadmissible. Our decision in State v. McCarthy, 259 Minn. 24, 104 N. W. 2d 673, 87 A. L. R. 2d 360 (1960), upon which the majority opinion relies, so interpreted the statute as it existed at that time. This interpretation was permissible since the statute, unlike similar statutes in several other states, did not make testing mandatory and contained no specific provision authorizing evidence of refusal to submit to testing. Subsequent legislative history, however, presents the issue of statutory interpretation in a wholly different context. In the 1961 legislative session, which followed the McCarthy decision, the legislature amended § 169.121, subd. 2, by adding this language: "[B]ut the refusal to permit the taking of specimens for such chemical analysis shall not be admissible in evidence. * * *" L. 1961, c. 454, § 9. Thereafter, Schmerber v. California, 384 U. S. 757, 86 S. Ct. 1826, 16 L. ed. 2d 908 (1966), cleared constitutional doubt as to the validity of mandatory chemical testing, and in the 1971 legislative session the legislature deleted the 1961 language that proscribed admission of evidence of refusal to be tested. L. 1971, c. 893, § 2.

It seems inescapable to me that by the 1971 amendment the legislature intended to authorize the admission of such evidence. Although the legislature could have even more clearly manifested its intent by inserting express language authorizing the admission of evidence of refusal to submit to chemical testing, the less tenable alternative is to assume that the legislature simply intended to restore the McCarthy interpretation by deleting the very language that McCarthy had inspired. The concept of the implied-consent law had by 1971 been more widely accepted than at the time of its first enactment, with

increased public awareness of its routine use. This being so, the legislature could well have intended to avoid a jury's speculating that a chemical test had been given to the defendant but that the absence of any evidence concerning the result indicated that the results were negative.

My second point of disagreement with the majority opinion is on the constitutional issue. This is more fundamental for it effectively precludes statutory authorization regardless of how explicit it might be. State v. McCarthy, *supra*, upon which the majority relies, seemingly held—although in an extraordinarily oblique way—that the admission of such evidence contravened a defendant's constitutional right against testimonial self-incrimination. Without any analysis of its constitutional significance, the court simply cited art. 1, § 7, of the Minnesota Constitution, which provides in part that "[n]o person shall be * * * compelled in any criminal case to be a witness against himself,"[2] and Minn. St. 611.11, which provides that a defendant's "failure to testify shall not create any presumption against him, nor shall it be alluded to by the prosecuting attorney or by the court." These undiscussed citations were followed by a discussion of judicial precedents in which the result of allowing or disallowing the admissibility of such evidence was based on statutory, not constitutional, grounds. Distinguishing the contrary precedents of other states, this court noted that the statutes in those states made testing mandatory, whereas our legislature "intended that the choice should be absolutely free and not encumbered by a liability." 259 Minn. 30, 104 N. W. 2d 677, 87 A. L. R. 2d 367. This court

[2] The court did not refer to the Fifth Amendment to the United States Constitution, but nothing in the opinion is indicative of an intent to interpret or apply the like provisions of both constitutions differently. As with the constitutional guarantees of equal protection, for example, we ordinarily consider such fundamental provisions in both constitutions to be the same. Minneapolis Federation of Teachers v. Obermeyer, 275 Minn. 347, 354, 147 N.W. 2d 358, 363 (1966).

concluded, without other explication: "Based upon our constitutional and statutory restrictions as above set forth and conscious that the tests specified by § 169.121 must be voluntary, we conclude that the admission of the evidence described constituted reversible error." 259 Minn. 31, 104 N. W. 2d 678, 87 A. L. R. 2d 367.

McCarthy, if indeed it was decided on constitutional grounds, stands alone. It does not square, first, with the decisions of the United States Supreme Court. Schmerber v. California, 384 U. S. 757, 86 S. Ct. 1826, 16 L. ed. 2d 908 (1966), considered, in a prosecution for driving an automobile while under the influence of an intoxicating liquor, the admissibility of the results of a chemical analysis of a blood sample extracted from the accused, by a physician under police direction, despite the accused's refusal to consent to the procedure. Squarely holding that the use of this evidence did not violate the Fifth Amendment privilege of a person not to be "compelled in any criminal case to be a witness against himself," the court reasoned that it did not involve state compulsion for defendant "to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." 384 U. S. 761, 86 S. Ct. 1830, 16 L. ed. 2d 914.

A marginal comment to the Schmerber opinion (384 U. S. 765, note 9, 86 S. Ct. 1863, 16 L. ed. 2d 916),[3] to which the

[3] "This conclusion would not necessarily govern had the State tried to show that the accused had incriminated himself when told that he would have to be tested. Such incriminating evidence may be an unavoidable by-product of the compulsion to take the test, especially for an individual who fears the extraction or opposes it on religious grounds. If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forego the advantage of any *testimonial* products of administering the test—products which would fall within the privilege. Indeed, there may be circumstances in which the pain, danger, or severity of an operation would almost inevitably cause a person to prefer confession to undergoing the 'search,' and nothing we say today should be taken as establishing the permissibility of compulsion in that case. But no such situation is presented in this case."

majority opinion here adverts, expressed a reservation as to the admissibility of *testimonial* self-incrimination as a result of compulsion to be tested, such as in the case of individuals who would confess rather than to suffer the emotional or physical pain of some kinds of extractive procedures. This expressed reservation is irrelevant in the instant case, for there is not the slightest intimation that the admission which defendant made was the result of any concern about the pain or hazard or religious infringement involved in the proffered chemical test. There could be no such concern, moreover, with respect to submitting a mere sample of breath or urine, and even as to the extraction of blood, as the court recalled in another footnote (384 U. S. 771, note 13, 86 S. Ct. 1836, 16 L. ed. 2d 920),[4], such concern, except for religious scruples, would be highly doubtful.

California is the leading post-Schmerber state authority that evidence of a refusal to take a chemical test is not constitutionally impermissible. In People v. Ellis, 65 Cal. 2d 529, 55 Cal. Rptr. 385, 421 P. 2d 393 (1966), the California Supreme Court, in an opinion by Mr. Chief Justice Roger Traynor, held that the defendant's refusal to speak words so that a victim of a crime might be aided in making her identification of her assailant, was not testimonial communication but was circumstantial evidence of consciousness of guilt. Although the conviction was reversed because the police had not informed defendant that evidence of his refusal would be admissible, the chief justice wrote:

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[4] "'The blood test procedure has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors.' Breithaupt v. Abram [352 U. S. 432, 436, 77 S. Ct. 408, 410, 1 L. ed. 448, 451]."

"* * * A guilty party may prefer not to find himself in a situation where consciousness of guilt may be inferred from his conduct, but it can be scarcely be contended that the police, who seek evidence from the test itself, will tend to coerce parties into refusing to take tests in order to produce this evidence.

"Although conduct indicating consciousness of guilt is often described as an 'admission by conduct,' such nomenclature should not obscure the fact that guilty conduct is not a testimonial statement of guilt. It is therefore not protected by the Fifth Amendment. By acting like a guilty person, a man does not testify to his guilt but merely exposes himself to the drawing of inferences from circumstantial evidence of his state of mind.

"We are aware that the United States Supreme Court in Schmerber v. State of California * * * has cautioned that in some cases the administration of tests might result in 'testimonial products' proscribed by the privilege. We do not believe, however, that the inferences flowing from guilty conduct are such testimonial products. Rather, the court's concern seemed directed to insuring full protection of the testimonial privilege from even unintended coercive pressures. In the case of a blood test, for example, the court considered the possibility that fear induced by the prospect of having the test administered might itself provide a coercive device to elicit incriminating statements. Such a compelled testimonial product would of course be inadmissible." 65 Cal. 2d 537, 55 Cal. Rptr. 389, 421 P. 2d 397.

Having so stated the predicate in Ellis, the California Supreme Court in People v. Sudduth, 65 Cal. 2d 543, 55 Cal. Rptr. 393, 421 P. 2d 401 (1966), decided the same term, squarely held

that the prosecution's evidence and comment upon refusal of defendant to submit to a breathalyzer test was constitutionally admissible.[5]

Other cases which have followed the California doctrine are City of Waukesha v. Godfrey, 41 Wis. 2d 401, 164 N. W. 2d 314 (1969); State v. Holt, 261 Iowa 1089, 156 N. W. 2d 884 (1968); State v. Heisdorffer, 164 N. W. 2d 173 (Iowa 1969); State v. Cary, 49 N. J 343, 230 A. 2d 384 (1967); City of Westerville v. Cunningham, 15 Ohio St. 2d 121, 239 N. E. 2d 40 (1968). Pre-Schmerber cases, some of which are cited in State v. McCarthy, *supra*, are collected at 87 A. L. R. 2d 370, 378.

It is my opinion that neither the statute nor the Constitutions of Minnesota and the United States make inadmissible the evidence that the offered chemical testing of the alcoholic content of defendant's blood was refused.[6] To the extent that State v. McCarthy, *supra*, may be considered to have controlled the contrary opinion of the court, I would overrule it and affirm the conviction.

OTIS, Justice (dissenting).

I join in the dissent of Mr. Justice Peterson.

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[5] The California statutory scheme provided for mandatory chemical testing as opposed to the voluntary scheme in Minn. St. 169.121, the kind of distinction observed in State v. McCarthy, 259 Minn. 24, 104 N.W. 2d 673, 87 A. L. R. 2d 360 (1960). Of course, this distinction relates only to the issue of statutory interpretation, for the constitutional issue is exactly the same in either case.

[6] This opinion is not inconsistent with our decision in State v. Beck, 289 Minn. 287, 183 N.W. 2d 781 (1971), to which the majority adverts in footnote 1. There, the prosecutor, without more, pointlessly adduced testimony of the arresting police officer that the accused had been given a Miranda warning. The obvious implication was that the accused had declined to give *testimonial* evidence, as he has a clear Fifth Amendment right to do. Here, however, the pointed testimony of the police officer was that the accused had declined to give *nontestimonial* physical evidence, which does not have that constitutionally protected status.

Mr. Justice Yetka and Mr. Justice Scott, not having been members of this court at the time of the submission, took no part in the consideration or decision of this case.

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

MINN. STAT. 169.121 (1969)

169.121 MOTOR VEHICLE DRIVERS UNDER INFLUENCE OF DRUGS OR ALCOHOLIC BEVERAGES. Subdivision 1. It shall be unlawful and punishable as provided in this section for any of the following persons to drive, operate or be in actual physical control of any vehicle within this state:

(a) A person who is under the influence of an alcoholic beverage or narcotic drug;

(b) A person who is an habitual user of narcotic drugs;

(c) A person who is under the influence of a combination of any two or more of the elements named in subsections (a) and (b) hereof.

The provisions of this subdivision apply, but are not limited in application, to any person who drives, operates, or who is in actual physical control of any vehicle in the manner prohib-

ited by this subdivision upon the ice of any lake, stream, or river, including but not limited to the ice of any boundary water.

Subd. 2. Upon the trial of any prosecution arising out of acts alleged to have been committed by any person arrested for driving, operating, or in actual physical control of a motor vehicle while under the influence of an alcohol beverage, the court may admit evidence of the amount of alcohol in the person's blood taken voluntarily or pursuant to section 169.123 as shown by a medical or chemical analysis of his blood, or of his breath or urine if the person arrested elected to take such test in lieu thereof.

For the purposes of this subdivision:

(a) evidence that there was at the time 0.05 percent or less by weight of alcohol in the person's blood is prima facie evidence that such person was not under the influence of an alcoholic beverage;

(b) evidence that there was at the time more than 0.05 percent and less than 0.10 percent by weight of alcohol in the person's blood is relevant evidence but it is not to be given prima facie effect in indicating whether or not the person was under the influence of an alcoholic beverage;

(c) evidence that there was at the time 0.10 percent or more by weight of alcohol in the person's blood may be admitted as prima facie evidence that the person was under the influence of an alcoholic beverage.

The foregoing provisions shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether or not such person was under the influence of an alcoholic beverage, but the refusal to permit the taking of specimens for such chemical analysis shall not be admissible in evidence. In the event of a breath or urine test, the percentages above shall be increased by 10 percent.

For the purposes of this section, an "alcoholic beverage" means any liquid containing more than one-half of one percent of alcohol by volume.

Subd. 3. Every person who is convicted of a violation of this section shall be punishable by imprisonment of not less than ten days nor more than 90 days, or by a fine of not less than $10 nor more than $100, and his driver's license shall be revoked for not less than 30 days, except that every person who is convicted of a violation of this section, when such violation is found to be the proximate cause of grievous bodily injury or death to another person, shall be punished by imprisonment for not less than 60 days nor more than 90 days, and his driver's license shall be revoked for not less than 90 days.

Subd. 4. Every person who is convicted of a violation of this section within three years of any previous conviction under this section shall be punished by imprisonment for not less than ten days nor more than 90 days, and his driver's license shall be revoked for not less than 90 days.

Subd. 5. Whenever a person is charged with a violation of this section within three years of a previous conviction hereunder, and he shall forfeit his bail, it shall be the duty of the prosecuting officer to immediately apply to the court for a bench warrant, and thereupon the court shall forthwith issue a warrant for the arrest of the accused.

Subd. 6. The court may stay imposition or execution of any sentence authorized by subdivision 3 or 4 upon a medical recommendation and on the condition that the convicted person submit to medical treatment in a suitable public or private institution. A stay of imposition or execution shall be in the manner provided in section 609.135.

CHAPTER 893—H.F.No.851

An act relating to highway traffic regulation; screening of drivers for driving while under the influence of alcohol and drivers license violations; providing penalties; amending Minnesota Statutes 1969, Section 169.121, Subdivisions 1 and 2 and Section 169.123, Subdivision 2.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Minnesota Statutes 1969, Section 169.121, Subdivision 1, is amended to read:

169.121 **HIGHWAY TRAFFIC REGULATIONS; INTOXICATION; PRELIMINARY SCREENING TEST.** Subdivision 1. It shall be unlawful and punishable as provided in this section for any of the following persons to drive, operate or be in actual physical control of any vehicle within this state:

(a) A person who is under the influence of an alcoholic beverage or narcotic drug;

(b) A person who is an habitual user of narcotic drugs;

(c) A person who is under the influence of a combination of any two or more of the elements named in subsections (a) and (b) hereof;

(d) A person whose blood contains 0.10 percent or more by weight of alcohol.

When a police officer has reason to believe from the manner in which a driver is driving, operating, or actually controlling, or has driven, operated, or actually controlled, a vehicle that such driver may be violating this subdivision he may require the driver to provide a sample of his breath for an immediate preliminary screening test or analysis before an arrest is made, using a device approved by the commissioner for this purpose. The results of such a preliminary screening test or analysis shall be used only for the purpose of guiding the officer in deciding whether an arrest should be made, and shall not be used as evidence in any court action.

Changes or additions indicated by underline, deletions by ~~strikeout~~.

The driver of any motor vehicle shall furnish such a sample of his breath when required to do so. The provisions of Minnesota Statutes, Section 169.123, shall apply to any driver who refuses to furnish a sample of his breath; provided that the license or permit of a driver shall not be revoked pursuant to Minnesota Statutes, Section 169.123, Subdivision 4, for refusal to provide a sample of his breath for preliminary screening purposes, if he submits to a blood, breath or urine test to determine the alcoholic content of his blood pursuant to Minnesota Statutes, Section 169.123, Subdivision 2. Another test may be required of the driver following the screening test pursuant to the provisions of this chapter, which shall be admissible evidence in accordance therewith.

Nothing in this subdivision authorizing such preliminary screening test or analysis shall be construed as changing, limiting, or otherwise modifying the procedures, safeguards, and other provisions of sections 169.121 to 169.123 or ordinances in conformity therewith.

The provisions of this subdivision apply, but are not limited in application, to any person who drives, operates, or who is in actual physical control of any vehicle in the manner prohibited by this subdivision upon the ice of any lake, stream, or river, including but not limited to the ice of any boundary water.

Sec. 2. Minnesota Statutes 1969, Section 169.121, Subdivision 2, is amended to read:

Subd. 2. Upon the trial of any prosecution arising out of acts alleged to have been committed by any person arrested for driving, operating, or in actual physical control of a motor vehicle ~~while under the influence of an alcohol beverage~~ in violation of subparagraphs a, c, or d of section 1 hereof , the court may admit evidence of the amount of alcohol in the person's blood ~~taken voluntarily or pursuant to section 169.123~~ , breath, or urine as shown by a medical or chemical analysis ~~of his blood, or of his breath or urine if the person arrested elected to take such test in lieu~~ thereof ; if said test is taken voluntarily or pursuant to section 169.123 .

For the purposes of this subdivision:

(a) evidence that there was at the time 0.05 percent or less by weight of alcohol in the person's blood is prima facie evidence that such person was not under the influence of an alcoholic beverage;

(b) evidence that there was at the time more than 0.05 percent and less than 0.10 percent by weight of alcohol in the person's blood is relevant evidence but it is not to be given prima facie effect in indicating whether or not the person was under the influence of an alcoholic beverage~~;~~.

~~(c) evidence that there was at the time 0.10 percent or more by weight of alcohol in the person's blood may be admitted as prima facie evidence that the person was under the influence of an alcoholic beverage.~~

The foregoing provisions shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether or not such person was under the influence of an alcoholic beverage~~.~~ ~~; but the refusal to permit the taking of specimens for such chemical analysis shall not be admissible in evidence. In the event of a breath or urine test, the percentages above shall be increased by 10 percent.~~

For the purposes of this section, an "alcoholic beverage" means any liquid containing more than one-half of one percent of alcohol by volume.

For the purposes of this section "percent by weight of alcohol" shall be defined as the number of grams of alcohol per 100 milliliters of blood.

Sec. 3. Minnesota Statutes 1969, Section 169.123, Subdivision 2, is amended to read:

Subd. 2. **IMPLIED CONSENT; CONDITIONS; ELECTION AS TO TYPE OF TEST.** Any person who drives or operates a motor vehicle upon the public highways of this state shall be deemed to have given consent subject to the provisions of Laws 1961, Chapter 454, to a chemical test of his blood, breath, or urine for the purpose of determining the alcoholic content of his blood. The test shall be administered at the direction of a peace officer~~,~~. The test may be administered when ~~(1)~~ the officer has reasonable and probable grounds to believe that a person was driving or operating a motor vehicle while said person was under the influence of an alcoholic beverage, and ~~(2)~~ one of the following conditions exist: (1) the said person has been lawfully placed under arrest for alleged commission

of the said described offense in violation of Minnesota Statutes, Section 169.121, or an ordinance in conformity therewith ; or, (2) the person has been involved in a motor vehicle collision resulting in property damage, personal injury, or death. The test may also be administered when the officer has reason to believe that a person was driving or operating a motor vehicle in violation of Minnesota Statutes, Section 169.121 or an ordinance in conformity therewith and the person has either refused to take the preliminary screening test provided for by Minnesota Statutes, Section 161.121, Subdivision 1, or such preliminary screening test was administered and recorded a blood alcohol level of .10 percent or more by weight of alcohol . ~~No action shall be taken hereunder against the said person unless the first two enumerated conditions existed at the time the officer requested the chemical test specimen.~~ Any person may decline to take a direct blood test and elect to take either a breath, or urine test, whichever is available, in lieu thereof, and either a breath or urine test shall be made available to the arrested person who makes such an election. No action shall be taken against the person for declining to take a direct blood test unless either a breath, or urine test was available. At the time the peace officer requests such chemical test specimen, he shall inform the arrested person that his right to drive may be revoked or denied if he refuses to permit the test and that he has the right to have additional tests made by a person of his own choosing.

Approved June 7, 1971.

MINN. STAT. 169.121 (1971)

169.121 MOTOR VEHICLE DRIVERS UNDER INFLUENCE OF DRUGS OR ALCOHOLIC BEVERAGES. Subdivision 1. It shall be a misdemeanor for any of the following persons to drive, operate or be in actual physical control of any vehicle within this state:

(a) A person who is under the influence of an alcoholic beverage or narcotic drug;

(b) A person who is a habitual user of narcotic drugs;

(c) A person who is under the influence of a combination of any two or more of the elements named in subsections (a) and (b) hereof;

(d) A person whose blood contains 0.10 percent or more by weight of alcohol.

When a police officer has reason to believe from the manner in which a driver is driving, operating, or actually controlling, or has driven, operated, or actually controlled, a vehicle that such driver may be violating this subdivision he may require the driver to provide a sample of his breath for an immediate preliminary screening test or analysis before an arrest is made, using a device approved by the commissioner for this purpose. The results of such a preliminary screening test or analysis shall be used only for the purpose of guiding the officer in deciding whether an arrest should be made, and shall not be used as evidence in any court action.

The driver of any motor vehicle shall furnish such a sample of his breath when required to do so. The provisions of Minnesota Statutes, Section 169.123, shall apply to any driver who refuses to furnish a sample of his breath; provided that the license or permit of a driver shall not be revoked pursuant to Minnesota Statutes, Section 169.123, Subdivision 4, for refusal to provide a sample of his breath for preliminary screening

purposes, if he submits to a blood, breath or urine test to determine the alcoholic content of his blood pursuant to section 169.123, subdivision 2. Another test may be required of the driver following the screening test pursuant to the provisions of this chapter, which shall be admissible evidence in accordance therewith.

Nothing in this subdivision authorizing such preliminary screening test or analysis shall be construed as changing, limiting, or otherwise modifying the procedures, safeguards, and other provisions of sections 169.121 to 169.123 or ordinances in conformity therewith.

The provisions of this subdivision apply, but are not limited in application, to any person who drives, operates, or who is in actual physical control of any vehicle in the manner prohibited by this subdivision upon the ice of any lake, stream, or river, including but not limited to the ice of any boundary water.

Subd. 2. Upon the trial of any prosecution arising out of acts alleged to have been committed by any person arrested for driving, operating, or in actual physical control of a motor vehicle in violation of subparagraphs a, c, or d of subdivision 1 hereof, the court may admit evidence of the amount of alcohol in the person's blood, breath, or urine as shown by a medical or chemical analysis thereof; if said test is taken voluntarily or pursuant to section 169.123.

For the purposes of this subdivision:

(a) evidence that there was at the time 0.05 percent or less by weight of alcohol in the person's blood is prima facie evidence that such person was not under the influence of an alcoholic beverage;

(b) evidence that there was at the time more than 0.05 percent and less than 0.10 percent by weight of alcohol in the

person's blood is relevant evidence but it is not to be given prima facie effect in indicating whether or not the person was under the influence of an alcoholic beverage.

The foregoing provisions shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether or not such person was under the influence of an alcoholic beverage.

For the purposes of this section, an "alcoholic beverage" means any liquid containing more than one-half of one percent of alcohol by volume.

For the purposes of this section "percent by weight of alcohol" shall be defined as the number of grams of alcohol per 100 milliliters of blood.

Subd. 3. Every person who is convicted of a violation of this section shall be punishable by imprisonment of not less than 10 days nor more than 90 days, or by a fine of not less than $10 nor more than $100, and his driver's license shall be revoked for not less than 30 days, except that every person who is convicted of a violation of this section, when such violation is found to be the proximate cause of grievous bodily injury or death to another person, shall be punished by imprisonment for not less than 60 days nor more than 90 days, and his driver's license shall be revoked for not less than 90 days.

Subd. 4. Every person who is convicted of a violation of this section within three years of any previous conviction under this section shall be punished by imprisonment for not less than ten days nor more than 90 days, and his driver's license shall be revoked for not less than 90 days.

Subd. 5. Whenever a person is charged with a violation of this section within three years of a previous conviction hereunder, and he shall forfeit his bail, it shall be the duty of

the prosecuting officer to immediately apply to the court for a bench warrant, and thereupon the court shall forthwith issue a warrant for the arrest of the accused.

Subd. 6. The court may stay imposition or execution of any sentence authorized by subdivision 3 or 4 upon a medical recommendation and on the condition that the convicted person submit to medical treatment in a suitable public or private institution. A stay of imposition or execution shall be in the manner provided in section 609.135. The court shall report to the commissioner of public safety any stay of execution of sentence granted under the provisions of this section.

[*157 c 297 s 1; 1961 c 454 s 9; 1967 c 283 s 1; 1967 c 569 s 1; 1969 c 744 s 1; Ex 1971 c 27 s 6; 1971 c 244 s 1; 1971 c 893 s 1, 2*]